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IN THE
COURT OF APPEALS OF INDIANA

JOHN RAY MAGGERT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A05-0607-CR-406
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0503-FA-48

January 30, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

John Ray Maggert appeals his sentence, following a guilty plea, for child molesting, a Class A felony. Maggert raises two issues, which we restate as whether the trial court properly sentenced Maggert and whether the sentence is inappropriate based on the nature of the offense and Maggert's character. Concluding that the trial court properly sentenced Maggert and that his sentence is not inappropriate, we affirm.

Facts and Procedural History

On March 28, 2005, the State charged Maggert with two counts of child molesting as Class A felonies. On January 25, 2006, the parties entered into a plea agreement under which Maggert pled guilty to one count of child molesting. In exchange for this plea, the State dropped the other count and agreed to recommend at the sentencing hearing that the executed portion of the sentence not exceed thirty-five years. A sentencing hearing was held on February 23, 2006, after which the trial court entered an order finding nine aggravating circumstances:

1. By his own admission, the Defendant molested his victim on 5 to 10 separate occasions.
2. The Defendant molested another child on 3 to 10 occasions.
3. The Defendant has suffered 1 prior felony conviction.
4. The Defendant has suffered 1 prior misdemeanor conviction.[1]
5. Ten counts of Sexual Exploitation with a Minor are pending against the Defendant in the state of Tennessee.
6. The Defendant admits to having sexual contact with the victim for the last time 2 days prior to his arrest.
7. The Defendant used illicit drugs to encourage his victims to engage in sexual contact with him.

[1] The record indicates that Maggert has two prior misdemeanor convictions for driving under the influence.

8. The Defendant enjoyed a position of trust with respect to his victims; he violated that trust by molesting both of them.
9. By his own admission, on at least one occasion, the Defendant molested one of his victims in the presence of another.

Transcript at 97.

The trial court also found two mitigating circumstances:

1. The Defendant was a victim of molestation himself as a child; however, the Court declines to accord substantial weight to that mitigator, noting that the Defendant is aware of the psychological trauma that is inflicted upon a child as a result of being molested, nevertheless, he chose to inflict those injuries on his [victims].
2. The Defendant has accepted responsibility for his criminal acts; however, the Court minimizes the weight to be accorded to that mitigator, noting that the Defendant received the benefit of a plea agreement in exchange for admission of guilt.

Id.

The trial court found the aggravators outweighed the mitigators and sentenced Maggert to fifty years, with fifteen years suspended on a ten-year term of probation. This sentence is the maximum allowed for a Class A felony, and twenty years above the thirty-year "advisory" sentence.[2] Ind. Code § 35-50-2-4. Maggert now appeals his sentence.

Discussion and Decision

I. The Trial Court Properly Sentenced Maggert

Maggert argues that the trial court improperly sentenced him. As we consider Maggert's arguments, we remember that under our standard of review, sentencing determinations are within the sound discretion of the trial court, and we will only reverse for

[2] Under the old sentencing scheme, the "presumptive" sentence was also thirty years.

an abuse of discretion. Henderson v. State, 848 N.E.2d 341, 344 (Ind. Ct. App. 2006). We will find the trial court abused its discretion only when its decision is clearly against the logic and effect of the facts and circumstances before the court. Id.

Because of the timing of events in this case, we must first discuss the recent change in Indiana's statutory sentencing scheme. In 2004, the United States Supreme Court decided Blakely v. Washington, 542 U.S. 296 (2004), an opinion that called into question the constitutionality of Indiana's current sentencing scheme. Our legislature responded to Blakely by amending our sentencing statutes to replace "presumptive" sentences with "advisory" sentences, effective April 25, 2005. Weaver v. State, 845 N.E.2d 1066, 1070 (Ind. Ct. App. 2006), trans. denied. Maggert committed the criminal offenses before this statute took effect, but was sentenced after. Under these circumstances, there is a split on this court as to whether the advisory or presumptive sentencing scheme applies. Compare Settle v. State, 709 N.E.2d 34, 35 (Ind. Ct. App. 1999) (sentencing statute in effect at the time of the offense, rather than at the time of conviction or sentencing, controls) with Samaniego-Hernandez v. State, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) (concluding that change from presumptive sentences to advisory sentences is procedural rather than substantive and therefore application of advisory sentencing scheme is proper when defendant is sentenced after effective date of amendment even though offense was committed before). Our supreme court has not explicitly ruled which sentencing scheme applies in these situations, but a recent decision seems to indicate that the date of sentencing is the critical date. In Prickett v. State, 856 N.E.2d 1203 (Ind. 2006), the defendant committed the crimes and was sentenced

prior to the amendment date. In a footnote, our supreme court states that "[w]e apply the version of the statute in effect at the time of Prickett's sentence and thus refer to his 'presumptive' sentence, rather than an 'advisory' sentence." Id. at 1207 n.3 (emphasis added).

Under the presumptive sentencing scheme, if the trial court imposes a sentence in excess of the statutory presumptive sentence, it must identify and explain all significant aggravating and mitigating circumstances and explain its balancing of the circumstances. Rose v. State, 810 N.E.2d 361, 365 (Ind. Ct. App. 2004). Although our supreme court has not yet interpreted the amended statute, its plain language seems to indicate that under the advisory scheme, "a sentencing court is under no obligation to find, consider, or weigh either aggravating or mitigating circumstances." Fuller v. State, 852 N.E.2d 22, 26 (Ind. Ct. App. 2006), trans. denied. However, if a trial court does find, identify, and balance aggravating and mitigating factors, it must do so correctly, and we will review the sentencing statement to ensure that the trial court did so. See Ind. Code § 35-38-1-3 ("if the court finds aggravating circumstances or mitigating circumstances, [the trial court shall record] a statement of the court's reasons for selecting the sentence that it imposes"). Therefore, because the trial court here identified and weighed aggravating and mitigating circumstances, the analysis and result are the same under both sentencing schemes, and we need not determine the issue of retroactivity herein. See Primmer v. State, 857 N.E.2d 11, 16 (Ind. Ct. App. 2006).

B. Finding of Aggravating Circumstances

Maggert argues that the trial court improperly found aggravators that had been neither

admitted nor proven beyond a reasonable doubt to a jury, and therefore violated his constitutional right to a jury trial under Blakely. However, in his plea agreement, Maggert waived his right to have these facts proven to a jury.[3] See Strong v. State, 820 N.E.2d 688, 690 (Ind. Ct. App. 2005), trans. denied ("[A]s noted by the Blakely court, guilty plea defendants may waive their Apprendi rights by either stipulating to the relevant facts supporting the sentence enhancements or consenting to judicial factfinding."). We conclude that the trial court properly found and afforded weight to all of the identified aggravating circumstances.

C. Finding of and Weight Afforded to Mitigating Circumstances

Although the trial court has an obligation to consider all mitigating circumstances identified by a defendant, it is within the trial court's sound discretion whether to find mitigating circumstances. Newsome v. State, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003), trans. denied. We will not remand for reconsideration of alleged mitigating factors that have debatable nature, weight, and significance. Id. The trial court need not give a mitigating factor the same weight as would the defendant. Smallwood v. State, 773 N.E.2d 259, 263 (Ind. 2002).

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[3] The plea agreement states in relevant part:

> The defendant understands that he/she may have the right to a jury trial as to the factors the court will consider for purposes of enhancing the sentence imposed herein beyond or above the presumptive sentence. The defendant now hereby waives any rights he/she may have to a trial by jury on any sentencing factors that may exist, understands that the judge will determine the existence of any said factor within the judge's sole discretion as permitted by law, and consents to same. The defendant further agrees that this waiver shall apply to any future sentence imposed in this case resulting from a revocation of probation, if applicable.

Appellant's Appendix at 38.

Maggert contends the trial court gave insufficient weight to the following mitigating factors: (1) Maggert was molested as a child; and (2) Maggert pled guilty and accepted responsibility for his actions. The trial court found both of these mitigating factors, but minimized their weight. Maggert makes no argument as to why the court should have given more weight to the fact that he was molested as a child. Regardless, this circumstance is of debatable weight and significance, and we will not remand for reconsideration.

As to Maggert's guilty plea and remorse, we have long recognized that "a defendant who willingly enters a plea of guilty has extended a substantial benefit to the state and deserves to have a substantial benefit extended to him in return." Williams v. State, 430 N.E.2d 759, 764 (Ind. 1982), appeal dismissed, 459 U.S. 808 (1982). However, "a guilty plea is not inherently considered a significant mitigating circumstance." Primmer, 857 N.E.2d at 16 (emphasis in original). The significance of a guilty plea may be reduced if there is substantial admissible evidence of the defendant's guilt, id., or if the defendant receives a significant benefit in return for the plea. See Patterson v. State, 846 N.E.2d 723, 729 (Ind. Ct. App. 2006). Here, the State's evidence included Maggert's confession, statements by the victim that Maggert had sexual intercourse with him, and the fact that when U.S. Marshals served a search warrant on Maggert's residence, they observed one of the victims lying in Maggert's bed, wearing only boxer shorts. Further, in exchange for the guilty plea, the State dropped one count of child molesting, a Class A felony, and agreed to recommend that the executed sentence be no more than thirty-five years. We conclude that as Maggert had already received a substantial benefit in return for his plea agreement, the trial court did not

abuse its discretion in assigning the circumstances of Maggert's guilty plea and remorse minimal weight.

Maggert also contends that the trial court improperly overlooked the mitigating factors of Maggert's military service and his drug addiction, or chemical dependency. Both of these proffered mitigators are of debatable weight and significance, and we conclude the trial court did not abuse its discretion in affording them minimal weight.[4]

D. Balancing of the Factors

As previously stated, the trial court properly found all aggravators. Also, the trial court was not required to weigh the mitigators as heavily as would the defendant. Smallwood, 773 N.E.2d at 263. A single aggravator may be the basis for an enhanced sentence. Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. As the trial court found at least eight aggravators,[5] and afforded minimal weight to the two mitigating circumstances, we cannot say that the trial court abused its discretion in balancing the aggravators and mitigators. See Julian v. State, 811 N.E.2d 392, 403 (Ind. Ct. App. 2004), trans. denied (finding no abuse of discretion in balancing of factors where record indicated that trial court properly considered mitigators but decided not to accept them). The

[4] We note that we have previously held that a trial court may properly consider a history of substance abuse as an aggravating circumstance. Hildebrandt v. State, 770 N.E.2d 355, 364 (Ind. Ct. App. 2002), trans. denied.

[5] The trial court's sentencing order lists nine aggravating factors. As Maggert points out, the trial court found Maggert's previous misdemeanor conviction and his previous felony conviction to be two separate aggravators. We find no error in the trial court's sentencing order, but recognize that a defendant's criminal history is more properly considered a single aggravator. However, the distinction is immaterial because the extent of a defendant's criminal history will obviously affect the weight of that single aggravator.

trial court's sentence was proper.

II. Appropriateness of Maggert's Sentence

A. Standard of Review

When reviewing a sentence imposed by the trial court, we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We have authority to "revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). When conducting this inquiry, we may look to any factors appearing in the record. Cf. Samaniego-Hernandez, 839 N.E.2d at 806 ("our review of the record does not disclose any basis upon which to grant relief relative to [defendant's] character or the nature of the offense"); Julian, 811 N.E.2d at 403 (examining facts of case to determine that sentence was not inappropriate based on defendant's character).

B. Nature of Offenses and Maggert's Character

Maggert does not articulate an argument that his sentence should be reduced based upon the nature of the offense. Further, the record indicates that Maggert repeatedly engaged in sexual behavior with his victims, with whom he enjoyed a position of trust, after supplying them with crack cocaine and marijuana, and "occasionally" or "sometimes" used a condom. Appellant's App. at 70. Clearly, the nature of the offense does not justify reduction of the sentence.

Maggert argues that his sentence should be reduced based on the following factors

relating to his character: (1) he is forty-five years old and his prior record consists of one felony and one misdemeanor conviction; (2) he cooperated with police; (3) the "indication that the extent of Maggert's drug abuse might have contributed to the commission of this offense," appellant's brief at 14; (4) Maggert's previous experience of being molested; (5) Maggert's expression of remorse; and (6) Maggert's previous military service. To the extent that these circumstances comment favorably on Maggert's character, and we by no means conclude that they all do, they do not merit a reduction in sentence under rule 7(B). Although Maggert's criminal history is not comparatively extensive, it consists of multiple convictions and a felony. Significantly, Maggert was on probation when the instant offense occurred. Also, the fact that Maggert abused his position of trust with the victims to repeatedly cause them to submit to sexual conduct clearly reflects negatively upon his character. See Booker v. State, 790 N.E.2d 491, 497 (Ind. Ct. App. 2003), trans. denied (concluding that defendant's "abuse of this position of trust reflects poorly on his character").

We conclude that Maggert's sentence is not inappropriate based on the nature of the offense and his character.

Conclusion

We conclude that Maggert's sentence was proper, as the trial court properly found, weighed, and balanced the mitigating and aggravating factors. We further conclude that Maggert's sentence is not inappropriate based on the nature of the offense and his character.

Affirmed.

BAKER, J., and DARDEN, J., concur.